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Supreme Court, U.S.
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No. 00-1174

IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,

Petitioners,

v.

DANIEL WEBSTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a Court of Appeals has discretion to decline to consider an argument not presented to the district court in the first instance.

II. Whether a district court has jurisdiction permanently to enjoin a county from engaging in race and gender discrimination in awarding county contracts, where it has engaged in a course of unlawful discrimination for a period of 20 years except when enjoined and intends to continue such conduct in the future.

III. Whether the injunction in this case is moot where the district court found as a matter of fact that the County was going to continue the Program until 2004.

IV. Whether the case is moot where the district court awarded damages as well as declaratory and injunctive relief, and the damages award was predicated in part on the order of the district court here at issue.

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STATEMENT OF THE CASE

Fulton County repeatedly misrepresents the facts of record, both the individual facts proven at trial and the conclusions drawn from them by the district court. The County further attempts to reargue the district court's findings of fact, even though the factual findings of the district court are final[1] and not subject to further appeal.

For example, Fulton County states that it adopted an MFBE Program in 1994 "to alleviate the effects of past and present discrimination." Pet. at 4. The district court, however, determined otherwise:

> There is no evidence that the Fulton County Government has significantly or systematically discriminated against African-American or other minority businesses in the decades of the 1980's or 1990's. There is insufficient evidence that it has become a passive participant in a pervasive system of discrimination in the private sector and that racial and ethnic preferences have been adopted as a last resort to eliminate that discrimination. The program itself does nothing to remedy discrimination in private sector contracting. The goals set by the program are not based upon any realistic assessment of the availability of minority business enterprises in the Atlanta metropolitan marketplace. Pet. App. 63a.

Fulton County then attempts to cite facts to show that it had sought to use race- and gender-neutral means to remedy the

1. The findings of fact were affirmed by the Court of Appeals and the Petition does not claim any finding of fact as error.

alleged discrimination. Again, this representation flies directly in the face of a contrary and final determination of fact by the district court. Pet. App. 55a-62a. For example, the district court found that "Fulton County offered no evidence to refute the testimony of former Chairman Skandalakis that no consideration was ever given to substituting a program of race neutral measures as an alternative to numerical set asides based upon race and ethnicity." Pet. App. 58a.

The County's attempt to limit the scope of the district court's inquiry to the "statute," rather than to the County's conduct both within and without the statute, likewise misrepresents the proceedings below. The Complaint not only asserts that the statutory MFBE Program is unconstitutional but also explicitly and repeatedly accuses the County of discriminatory conduct not authorized by the statute. Perhaps the most egregious misrepresentation by Fulton County in this regard is a significant misquotation of the record on the scope trial.

In the Pretrial Order the district court directly ruled against Fulton County and expressly refused to limit the trial to the "statute." The district court stated: "In Paragraph 6 [of the pretrial order], I'm also **omitting the defendant's suggested statement** that the implementation of the Fulton County MFBE Program is not before the court in this bench trial."[2] However, Fulton County, in its Petition to this Court, quotes only a part of the district court's statement which appears to give the ruling the opposite meaning: "Moreover, at the outset of the trial, the court noted that 'the implementation of the Fulton County MFBE Program is not

2. Trial transcript, 5/11/98, at 3 (boldface added).

before the Court.' " Pet. at 7. Once Fulton County's attempt to mislead this Court, by misrepresenting facts and misquoting the record, is uncovered and the reality the case is understood, the complete lack of actual justiciable issues sufficient to support a writ of certiorari is apparent.

When the district court examined evidence of the County's actual practices, the district court found widespread acts of discrimination outside those authorized by the statute:

> The procedures used to achieve the participation goals included disqualifying majority firm bidders for failing to comply with the program (Pl. Exh. 3-25), awarding contracts to higher bidders in order to obtain minority participation (Pl. Exh. 35, 37), splitting bids so that minority firms received part of a contract when a majority firm was the overall low bidder (Pl. Exh. 49-54), solicitation of minority firms after bids were closed (Pl. Exh. 56, 57), rebidding contracts in order to obtain minority participation (Pl. Exh.58), treatment of the participation goals as mandatory requirements (Pl. Exh. 64-66, 70, 71,116), awarding "points" for minority participation in evaluation criteria (Pl. Exh. 73-77), and awarding an entire contract to minority vendor overall low bidders rather than splitting the contract to give part to majority firms low bidding on some items (Pl. Exh. 78-84). Pet. App. 59a.

Nowhere in the statute is there any provision authorizing such direct discrimination against low-bidding majority-owned businesses. (Exhibits (5/99), Plaintiff's Trial Exhibit 1.) Whether one characterizes this as "implementing" the program goals,

or simply as unconstitutional race discrimination by a politically or racially motivated county government, the County has committed widespread acts of race and gender discrimination not explicitly authorized by the statute itself. The permanent injunction entered by the district court is directed to the unconstitutional practice of race and gender discrimination as well as to the unconstitutional program.

Additional evidence supplied the motivational basis of the race and gender discrimination that occurred outside the statutory framework. Four of the seven County Commissioners are African-American, and the testimony showed that the measure was adopted, not to remedy actual race discrimination, but as the result of "racial politics." Pet. App. 58a. Fulton County Commissioners would "publicly berate, embarrass, ridicule, and threaten" personnel "who appeared before the Commission seeking approval on contracts that did not contain minority participation,"[3] even though such contracts were acceptable according to the program.

A nearly identical program of race preferences had been in place in Fulton County for 20 years for African-American preferences and 11 years for female preferences; and yet, at no point has the County ever proven, identified, considered, or even commissioned a study which concluded that the County was an "active or passive" participant in discrimination against minority- or female-owned business.[4]

3. Doc 148 — Pg 6-7.

4. The only anecdotal complaints of discrimination by female business owners and Native American business owners, either in the last public hearing or in a survey conducted by Fulton County, were that the County discriminated against them **in favor of African-Americans**.

Nor does the Petition mention that a federal district court had previously enjoined the Program, whereupon the County commissioned a study and immediately reimplemented a nearly identical Program. The district court found that the study relied upon by the County was completely inadequate to support an inference of race or gender discrimination and was, at points, "directly contrary to Justice O'Connor's analysis in *Croson*." Pet. App. 30a. Moreover, the evidence showed, and the district court held as a matter of undisputed fact, that the County intended to continue the conduct for at least another five-year period (*i.e.*, until 2004). Pet. App. 61a. Petitioner's attempt to characterize its misbehavior as a discrete and limited program extending for a fixed period and scheduled to end in September 2001 simply mischaracterizes the evidence.

In summary, plaintiff not only successfully pleaded and proved that Fulton County's MFBE Program was unconstitutional but also established that its race and gender discrimination was not limited to the actions authorized by the statute, was not limited to the fixed five year time period contained in the statute, and was not limited to measures drawn to remedy discrimination. The district court appropriately drew its injunction to address this behavior.

REASONS FOR DENYING THE WRIT

The Petition does not properly address the actual grounds of the decision below. The Court of Appeals did not even discuss the scope of the injunction, much less decide the issue. Rather, Fulton County did not present the issue to the district court, and the Court of Appeals refused to reverse, on grounds that the issue had not been preserved for appeal. The Petitioner has not shown any proper grounds for a writ of certiorari on the issue actually decided or even included the most critical issue of law in its "Questions Presented."

The actual grounds of decision also renders the Petitioner's attempt to show a split in circuit authority meaningless, since the Eleventh Circuit has not addressed the proper scope of injunctive relief in this case. The Eleventh Circuit, having not decided the matter, can hardly be in conflict with another circuit. Indeed, the only grounds for reversal would be a finding that a court of appeals does not have discretion to decline to hear an argument not presented to a district court in the first instance, which the Petition does not formally present as a question, much less show any split of authority, issue of national importance, or failure to follow precedent.

Even if the Petitioner had properly preserved the issue for appeal, it would have lost. The scope of the injunction was crafted to fit the evidence at trial. A district court has not only the discretion, but also the duty, to enjoin persistent race and gender discrimination. Here, where Fulton County has had a politically-motivated program of race and gender preferences in effect for 20 years, despite a previous injunction and despite a complete lack of evidence of any need for such preferences, the district court properly issued a permanent injunction.

Nor is the injunction overly burdensome. It does not interfere with the legislative process *per se*. Federal Rule of Civil Procedure 60 provides a simple and reasonable procedure to allow the County to implement such preferences if they are needed.

The claim of mootness is so clearly unfounded in fact that it cannot even be argued in good faith. The district court — in a finding of fact which has not been appealed and which was firmly grounded in the evidence — held that the Program would be continued, at least until 2004, unless it were enjoined.

I.

NEITHER THE RECORD NOR EITHER OF THE DECISIONS BELOW RAISE THE QUESTION OF THE SCOPE OF THE INJUNCTION PRESENTED BY THE PETITION.

A. The Court Of Appeals Declined To Address The Scope Of The Injunction Because It Was Not Presented To The District Court.

The Petitioner's first "Question Presented" does not bring into issue the actual grounds of the decisions below. The Court of Appeals did not decide whether the scope of the injunction was permissible. Rather, it held that Fulton County had failed to present the issue to the district court. The Court of Appeals thus declined to hear the issue for the first time on appeal: "We decline to address appellants' challenge to the scope of the injunction. The argument was not presented to the district court; rather, it was raised for the first time on appeal." Pet. App. 1a. The Court of Appeals did not make or intimate any ruling on the scope of the injunction at all.

Fulton County has thus not correctly framed the initial and critical issue for review. Properly stated, this issue is "Whether the Court of Appeals has discretion to decline to consider an argument not presented to the district court in the first instance."

The County has not argued that the Court of Appeals exceeded its discretion or cited any case authority or statute on the issue. Nor is the actual ground of the Court of Appeal's decision "fairly included" in the two substantive questions presented by the Petition (although the issue is raised in the text of Petitioner's argument). *See e.g.*, *American National Bank & Trust Co. v. Haraco, Inc.*, 473 U.S. 606, 608 (1985). *Cf. Evans v. United States*, 504 U.S. 255, 272 (1992) (Justice O'Connor, *concurring in part*). The failure of the Petition properly to raise the initial question actually presented by the case makes the case an improper one for review by this Court.

B. The Court Of Appeals Opinion Is A Correct Decision On Settled Law That It Need Not Consider An Argument Not First Presented To The District Court.

1. It Is Well-settled That Courts Of Appeals Have Discretion Not To Consider Issues First Raised On Appeal, And There Is No Split In The Circuits On This Issue.

There is no need for this Court to address the issue of a court of appeal's discretion to decline to decide issues not presented to the district court. The basis of the decision is a common holding in a well-settled area of appellate procedure.

"The decision whether to consider an argument first made on appeal is left primarily to the courts of appeals, to be exercised on the facts of the individual cases." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir. 1990). "A court of appeals generally will not consider a legal issue or theory unless it was presented to the trial court." *Roofing & Sheet Metal Services v. La Quinta Motor Inns*, 689 F.2d 982, 989 (11th Cir. 1985). The Petitioner has shown no split in authority among the circuits,[5] no disobedience to this Court's previous rulings, no issue of overriding national importance. Indeed, this Court has an almost identical rule: "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, because the Court of Appeals did not rule on the merits of the scope of the injunction, the Petition does not, perforce, present **any** issue where there is a split of authority in the circuits.[6] The decision of the Court of Appeals in this case implicates neither agreement nor disagreement with the holding in *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.2d 411 (6th Cir. 1999).

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5. The rule seems universal among the circuits. *E.g., Amax Land Co. v. Quarterman,* 181 F.3d 1356 (D.C. Cir. 1999); *Manzoli v. C.I.R.,* 904 F.2d 101 (1st Cir. 1990); *Rebaldo v. Cuomo*, 749 F.2d 133 (2d Cir. 1984); *B.B. Rider Corp. v. C.I.R.,* 725 F.2d 945 (3d Cir. 1984); *Grossman v. C.I.R.,* 183 F.3d 275 (4th Cir. 1999).

6. The district court opinion does stand. However, the Court of Appeals did not affirm it on the issue of the scope of the injunction and it is thus not binding precedent in the circuit on that issue.

2. The Scope Of The Injunction Is Not Jurisdictional And Is Subject To Waiver.

To avoid the necessity of showing that the issue was presented to the district court, Petitioner briefly attempts to depict the issue as a question of "jurisdiction" and urges that the issue is thus not subject to waiver. The only authority cited on this point, *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999), makes no such ruling and is distinguishable from this case.

The *City of Columbus* case involved a constitutional challenge to an affirmative action program, but it did not present allegations or evidence of any wrongdoing other than the facial unconstitutionality of the statute. The City entered into a **consent** order declaring the statute invalid and maintaining continued district court oversight. There was no litigation, no trial, no evidence — simply an agreement by the City of Columbus that its program would not pass Constitutional muster. On these facts the Court of Appeals found that after the consent order was entered there was no live case or controversy over which the district court could maintain jurisdiction, as required by Article III of the United States Constitution, because the consent order ended the program.

The present case stands in a much different posture. First, the district court found that Fulton County intended to continue its widespread constitutional violations in the absence of injunctive relief. Second, the district court found that Fulton county engaged in intentional race and gender discrimination both in and outside the Program. Third, there

was no consent agreement to discontinue the discrimination — only "scorched earth" litigation in an effort to continue the unconstitutional activity to this very day.

Fulton County's jurisdictional argument thus proves too much. If the entry of a permanent injunction against a county deprives a district court of jurisdiction on Article III grounds because once discrimination is enjoined there is no longer a case or controversy, then a district court may **never** enter permanent injunctive relief against race and gender discrimination by a municipal government. Of course, district courts should and do have jurisdiction to enter such relief.

There is no question that a federal district court has *subject matter* jurisdiction to hear this case and issue an appropriate equitable remedy. The extent of an injunction does not generally involve a question of subject matter jurisdiction, and there is no issue of personal jurisdiction. The Fourteenth Amendment, together with its implementing legislation (*e.g.* 42 U.S.C. § 1981[7] and 1983) and jurisdictional legislation (*e.g.* 28 U.S.C. § 1331 and 1343), extend federal court jurisdiction to decide and remedy cases of race and gender discrimination by county governments. Nor does a district court lack subject matter jurisdiction to enjoin a county's race discrimination, even where the order might collaterally impact municipal legislation; this Court has approved, in proper circumstances, equitable remedies for racial discrimination far more intrusive into state lawmaking activities than the one here. *E.g.*, *Spallone v. United States*, 493 U.S. 265 (1990); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The issue

7. There is no need here to argue that § 1981 is or is not enabling legislation, since § 1983 is fully sufficient to support the district court's jurisdiction.

of the breadth and duration of an injunction is certainly an important one (and one which the County should have considered and raised in the district court), but it is not a *jurisdictional* issue per se, and is therefore subject to waiver.

3. The County Had Adequate Opportunity To Raise The Matter Before The District Court.

The Petition also argues that the Court of Appeals erred in refusing to consider the matter, because Fulton County had not gotten an opportunity to contest it at the district court level.[8] The argument was made to (and rejected by) the Court of Appeals within the proper scope of its discretion, and does not constitute a matter of such importance that review by this Court is required.

The argument has no merit, anyway. In the first place, any "surprise" was occasioned only by the County's steadfast refusal to address the plain and explicit allegations of non-statutory conduct in the Complaint. The County had ample warning at the start of trial that the case would involve admission of evidence, and possible findings based on that evidence, of matters outside the statute itself. The district court expressly struck from the pretrial order a paragraph proposed by the County limiting the trial to the statute.

And even if the County were surprised, the Federal Rules of Civil Procedure both contemplate the situation alleged by Fulton County and provide a means for addressing such an issue to a district court. Federal Rule of Civil Procedure 52(b) allows a party to move a court to amend findings or make additional findings, as long as such motion is made

8. Again, this is not a question presented for review.

within 10 days of the judgment. Such a motion may be supported by affidavits. Fed. R. Civ. Proc. 52(c). Federal Rule of Civil Procedure 59 allows a party to move for a new trial and states that the "court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new finding and conclusions, and direct the entry of a new judgment." Fulton County availed itself of none of these avenues of relief available while the case was still before the district court, and its plea that it had no "opportunity" to challenge the scope of the injunction will not hold water.

II.

EVEN IF THE QUESTION WERE PROPERLY PRESENTED, THE INJUNCTION PLACES NO MORE BURDEN UPON FULTON COUNTY THAN THE RECORD SUPPORTS.

A. There Is No Conflict With The Sixth Circuit Because The Scope Of The Injunction Reflects The Extent Of The Injury.

Fulton County has for years engaged in wholesale race and gender discrimination, both in operating the 1994 MFBE Program and in the guise of operating the 1994 MFBE Program. Pet. App. 59a. This illegal discrimination stretched far beyond the terms of the race and gender preferences enacted by the Program and affected the manner in which all contracts were awarded. *Id.* The district court further found that Fulton County would continue its illegal discrimination indefinitely unless enjoined by the court. Pet. App. 61a. These findings are completely undisturbed on appeal. The district court thus issued its injunction directed at the illegal actions of Fulton County:

> Defendant Fulton County is hereby permanently enjoined from using racial, ethnic or gender participation goals in accepting or rejecting bids, determining whether bidders are responsive and responsible bidders *and in the awarding of Fulton County contracts*. Pet. App. 63a [emphasis added].

This injunction reflects evidence of a wide range of discrimination by Fulton County, including both acts that flow directly from the Program and acts that were either not connected to the Program, or at best indirectly connected to it.

The former Chairman of the Fulton County Commission offered unrefuted testimony that "he voted in favor of the 1994 MFBE program to advance his own political agenda by accommodating the African-American majority on the Board rather than to remedy the effects of past discrimination." Pet. App. 58a. Commissioners would publically berate, ridicule, and threaten County personnel who presented contracts with businesses owned by white males. (Doc. 163.) At the time of trial, Fulton County had had in effect a similar program for 20 years, substantially requiring that somewhere between 20% (in 1979) and 26% (in 1999) of all county contracts be awarded to African-American businesses. Pet. App. 3a. In the four years preceding trial, County utilization of minority businesses consistently exceeded even the most liberal estimates of availability; based on a count of minority-owned businesses in the Atlanta Standard Metropolitan Statistical Area, Fulton County's utilization of minority business was almost **double** the statistical expectation, exceeding statistical expectations

by seven standard deviations.[9] On this and similar evidence the district court thus determined that the discrimination engaged in by Fulton County extended far beyond that authorized by the Program.

The decision of the Eleventh Circuit affirming the district court thus is not in conflict with the decision of the Sixth Circuit in *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999), and when properly read is in full agreement with it. The *City of Columbus* case presented a situation in which the parties entered into a consent order agreeing that the *program* was unconstitutional. The district court retained jurisdiction though it made no further finding that the city had engaged in other illegal discrimination outside the program. The Sixth Circuit recognized that the Article III jurisdiction of a federal court extends to issuing expansive remedial orders in "those circumstances in which the . . . mere cessation of the particular activity or method of operation will not serve to remedy the [constitutional] violation." 172 F.3d at 417. The district court in the instant case found Fulton County engaged in blatant racial favoritism in awarding contracts and determined that merely ending the program would not serve to end the practice.

A district court might well, under some factual situations such as that in the *City of Columbus* case, decide that deference to a municipal legislature merits minimal declaratory or injunctive relief. Such is not the case here, due to the strong factors showing a need for broader relief: 1) The County's long history of imposing race and gender preferences without adequate legal justification;

9. Doc. 152 (testimony of George Easton, Ph.D).

2) The County's "repeat offender" status; 3) Evidence that the conduct was motivated by racial politics rather than a good-faith attempt to remedy discrimination; 4) Extensive evidence that the County's favoritism to minority and female business was not limited to the provisions of the MFBE Program; and 5) The proven risk that the county will be able to impose illegal race and gender preferences for years, due to the practical difficulties of bringing it to judgment. The district court conformed its injunction to this evidence.

Finally, the injunction in this case appropriately reflects the heightened scrutiny that the County would eventually encounter in attempting to defend any future explicit race or gender preferences. The Eleventh Circuit has construed this Court's decision in *Croson* to mean that:

> At the outset, it must be recognized that making employment decisions on the basis of race, ethnicity, or gender is presumptively illegal. Therefore, the County bears the initial burden of showing that the race, ethnicity, and gender-conscious measures it uses to determine contract awards is not prohibited by the Fourteenth Amendment.

Engineering Contractors Ass'n v. Metropolitan Dade County, 943 F. Supp. 1546, 1557 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997). This Court has affirmed injunctive relief more intrusive into the legislative arena, even where the underlying conduct was facially race-neutral. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). *See Spallone v. United States*, 493 U.S. 265 (1990). The factual predicate for such relief where the underlying conduct is explicitly based on race and gender preference must be correspondingly smaller.

Where repeated instances of race or gender discrimination have been proven at trial, the Eleventh Circuit generally considers that a permanent injunction should issue "absent clear and convincing proof that there is no probability of further non-compliance with the law." *N.A.A.C.P. v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982). In general, a court must fashion an injunction whose duration and breadth reflect the evidence. *E.g. Western Airlines, Inc. v. Criswell*, 709 F.2d 544 (9th Cir.), *aff'd*, 472 U.S. 400 (1985). A district court must certainly weigh heavily a county's right to enact legislation; however, such a right cannot constitute a *carte blanche* to enact a third[10] sequential set of racially targeted contracting provisions, where it has been shown in trial that no sufficient cause exists to support such a program. Even worse, it cannot be used as a strawman to hide a county's non-statutory discrimination from the eyes of equity.

B. The Injunction Does Not Preclude The County From Efforts To Remedy Discrimination.

A central weakness of the Petition is reflected in its repeated overstatement of the burden placed upon the County by the injunction. For example, Petition asserts that the "injunction precludes a municipal government from **ever taking any action** to eradicate the effects of past discrimination[11]. . . ." Pet. at 18 (emphasis added).

10. The evidence in support of the "Program" at issue in this case was commissioned — and in fact the Program itself was adopted — in response to an earlier federal district court injunction, enjoining a substantially identical Program.

11. Whether a municipal government can ever impose race or gender quotas "to remedy **past** discrimination" is at best doubtful,

(Cont'd)

In the first place, Fulton County has never given consideration to the use of race- or gender-neutral methods to remedy such discrimination (assuming that such discrimination existed, which the district court held not to be the case). Pet. App. 58a. The contention that the injunction precludes Fulton County from "ever taking any action" is 100% wrong in this respect, and reflects the County's continuing blindness to its duty to attempt such race or gender neutral remedies *before* implementing race- or gender-conscious set-asides.[12]

Next, in the extremely unlikely event that the County begins to discriminate against minority or female businesses, it has means at its disposal to implement racial or gender preferences if and when race-neutral and gender-neutral remedies prove ineffective. A party may petition a district court, in an independent action, for relief from a judgment or order. Fed. R. Civ. Proc. 60(b). The appropriate grounds here would appear to be that "it is no longer equitable that the judgment should have prospective application" and, under this ground, there is no time limit on the filing of such a motion. Fed. R. Civ. Proc. 60(b)(5). The possibility is entirely speculative, though, and in light of the record it seems quite remote.

(Cont'd)
anyway. *Croson* seems to hold that such quotas can only be used to remedy current discrimination.

12. Petitioner's argument that Eleventh Circuit's decision somehow conflicts with the Second Circuit's decision in *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 41 F.3d 62 (2d Cir. 1995), because it presumably prevents the adoption of a new plan, is thus illusory. In addition to the fact that the citation relied upon by Petitioner is mere dicta since the case was determined moot, nothing prevents Fulton County from adopting a plan that is race and gender neutral.

Certainly a county government has a right, and even an obligation, to ensure that it has not become an active or passive participant in discrimination against African-American businesses. The evidence in this case, however, indicates that the possibility of such an occurrence is remote. Fulton County uses the argument, not out of genuine concern, but rather to facilitate continued discrimination against non-minority businesses. Fulton County has for decades continuously discriminated against businesses owned by non-minority members, both by statute and by non-statutory conduct. As held below, such discrimination had no justification whatsoever in "remedying" discrimination. As a matter of undisputed fact, "no consideration was ever given to substituting a program of race neutral measures as an alternative to numerical set asides based upon race and ethnicity." Pet. App. 58a. In a word, the "classifications are in fact motivated by . . . simple racial politics." 488 U.S. at 492.

Third, unlike the injunction in *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.2d 411, 417 (6th Cir. 1999) — which was intended to "in advance restrain[ ] the discretion of a municipal body while it is in the exercise of powers that are legislative in their character," — and, unlike the injunction in *A.C.O.R.N. v. Edgar*, 56 F.3d 791 (7th Cir. 1995) — which Petitioners cite as establishing "the principle that federal courts may not interfere with, or restrain in advance, legislative activity by municipal bodies" — the injunction in the instant case does not prohibit legislative action at all.[13] It would allow Fulton County to propose, consider, debate and actually enact a statute prior to seeking relief from a district court, if such were necessary. The injunction will not operate to suppress

13. *Cf. Spallone v. United States*, 493 U.S. 265 (1990).

legislative debate nor will it interject the district court, unlike the district court in *City of Columbus* or the one in *A.C.O.R.N.*, into the legislative process. What it would not allow is for the County to implement, for a third time, a full-scale program of illegal race and gender discrimination, and continue the Program in effect until a plaintiff appears with the resources[14] and willpower to challenge it, and a district court can bring the case to trial[15].

III.

NEITHER THIS CASE NOR THE INJUNCTION IS MOOT.

The 1994 Fulton County MFBE Program contained, within its four corners, a provision for a five-year extension. Such an extension would have continued the program until September 2004. The district court made a general finding of fact that the Program would be continued unless it were enjoined, including a fairly specific implication that the identical program would have been renewed for five years. Pet. App. 61a. The Court of Appeals affirmed the decision, and the County has not petitioned for certiorari on grounds that the district court abused its discretion in finding this fact.

Given a final finding of fact that the Program would not have expired until 2004,[16] at the earliest, it is difficult to

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14. The district court awarded over 5,500 hours of time to Plaintiff's attorneys in this case, reflecting Fulton County's commitment to retaining the unlawful program of race and gender discrimination at all costs. Pet. App. 200a.

15. The case was filed in 1996; the injunction was entered in 1999.

16. The district court did not mention the year 2004, but it did find that the County intended to avail itself of a five-year extension (Cont'd)

understand how the Petitioner expects this Court to hold that the case is moot in 2001. The district court's finding — that the program would have been continued for at least five years unless enjoined — is now final. The claim of mootness thus cannot even be brought in good faith.

And finally, the claim of mootness simply makes no sense. The doctrine exists in order to guard against meaningless trials and appeals. "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe v. Wade*, 410 U.S. 113, 125 (1973). A finding that the case became moot in September 1999, necessarily would require that this Court **first** hold that the injunction expired in September 1999. But if this Court held that the injunction had expired, the matter would be concluded.

Certainly such a holding would not render the **case** moot. The district court's decision holding the program unlawful — the decision at issue here — was the basis of not only injunctive relief, but also the factual and legal basis for a later damages award. It constituted evidence in the liability portion of the damages claim. As held by the district court in a subsequent opinion,

> Plaintiff's success on the damages claims depended greatly on the Court's judgment of the constitutional issues involved in this case. Declaratory and injunctive relief were necessary

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(Cont'd)
provision in 1999. Respondent has thus extrapolated the date of September 2004, which necessarily flows from the district court's findings of fact.

> steps for Plaintiff to achieve monetary relief for damages it incurred. To obtain monetary damages, Plaintiff needed to show that Fulton County's MFBE program was unconstitutional.

Pet. App. 123a-124a. Thus, the district court order cannot be vacated as moot; to vacate the district court's order would effectively vacate the adjudication of liability for monetary damages. Plaintiff would lose its unpaid award of damages on grounds of mootness! Such a *reductio ad absurdum* proves the illogic of Petitioner's case.

This Court has never been sympathetic to arguments of mootness by an unrepentant defendant who so clearly desires to engage in unconstitutional conduct if it can free itself, even temporarily, of federal court review. Such a defendant is universally required to carry a heavy burden of proving that there is no likelihood of the conduct recurring if the case is dismissed for mootness.

> It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000). Fulton County has shown no record evidence whatsoever that it would cease the unlawful discrimination absent an injunction.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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